REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 130 'A' OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 912 of 2011 of the Chief Magistrate's Court at Narok – T. A. Sitati, SRM)

LEMASON TENGETI…….…….…….....APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

J U D G M E N T

1. The Appellant was tried and convicted before the Senior Principal Magistrate's court Narok for the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code. In that on the 16th day of September 2011 at Ole Suswa Reserve in Narok South District within Rift Valley Province, he killed **Wilson Boi Kipas**.

2. He was sentenced to life imprisonment at the close of the trial. He now appeals to this court against conviction and sentence.

3. His amended grounds of appeal state that:

> **"1. THAT, the pundit trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that the provisions of Section 20 (3) of the Criminal Procedure Code were not duly complied with.**
>
> **2. THAT, the pundit trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that the investigations done were shoddy revealing witness hostile.**
>
> **3. THAT, the pundit trial magistrate erred in law and fact when he awarded an excessively harsh sentence.**
>
> **4. THAT, the pundit trial magistrate erred in law and fact when he failed to put in consideration the circumstances surrounding the death of the deceased.**
>
> **5. THAT, the pundit trial magistrate erred in law and fact when he declined to adequately consider my defence and mitigation factors." (sic)**

4. He relied on his written submissions in support of the grounds. On grounds 1, 2 and 4 which challenge the validity of the trial and evidence upon which the conviction was based, the Appellant submits as follows.

5. Firstly, that trial magistrate having taken over the trial from his predecessor, **W. N. Njage,** failed to comply with the mandatory provisions of Section 200 (3) of the Criminal Procedure Code. Secondly, highlighting evidence by the investigating officer (**PW6**) and by **PW3** he stated that there were contradictions as related to the cause of the stabbing incident leading to this case.

6. Further that the element of provocation and/or intoxication should have been given more consideration by the trial court as the evidence showed that the Appellant was intoxicated and did not know what he was doing during the material incident.

7. Regarding the sentence, the Appellant argues that it was excessive in the circumstances. He faults the trial magistrate for conclusions made before sentence that the Appellant was not remorseful.

8. On behalf of the DPP Mr. Koima opposed the appeal. He stated that **PW1 – 3** had testified that the Appellant created a commotion at **PW3's** house demanding his rungu which he said had been stolen. That he subsequently killed the deceased when he tried to intervene. Mr. Koima stated that the prosecution evidence proved the offence charged.

9. In his view, the defence of intoxication is restricted under Section 13 of the Penal Code and besides, in this case, the Appellant's intoxication was self induced; that the Appellant's defence of intoxication is inconsistent with his proven conduct after the attack. He argued that the prosecution case is watertight and urged that the appeal be dismissed.

10. In **Pandya -Vs- Republic [1957] EA 336** the court set out the duty of the first appellate court by stating that:

> ***"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."***

11. The prosecution case through seven witnesses was that on 14/9/2011 the deceased and other revelers including **Charles Bett**, **John Kipas (PW1)**, **Stephen Tengeti (PW2)** and the Appellant were drinking chang'aa at the home of **Beatrice Cherono (PW3)** at Ol Suswa. Presently, **PW2** went away leaving the group including the deceased and the Accused in **PW3's** home. At some point the Appellant, claiming that his 'rungu' had been taken away caused a scene while wielding a simi. He used the simi to hack at **PW3's** door. The deceased rose up to placate him, but the Appellant responded by stabbing the deceased in the chest. The deceased died instantly. The Appellant was disarmed by **PW1** who also called the area chief.

12. **PW1** and other members of public attracted to the home by **PW3's** loud screams chased the Appellant who had fled the scene, and arrested him. They handed him over, along with the weapon to **APC Meshack Muma (PW4). IP Oscar Situma** of Ololulunga Police Station **(PW6)** was notified of the incident and visited the scene. He took over the exhibit simi with its scabbard and had the body removed. The Appellant who was in the custody of Bambani Police was handed over to **PW6** and was at the close of investigations charged.

13. When the Appellant was placed on his defence, he elected to give an unsworn statement. To the

effect that on the material date he went out on a drinking spree at Ol Suswa. Having drunk a lot of alcohol he retired in his house only to be woken up by persons who claimed he had killed a man. He said he had not kill anyone.

14. The prosecution witnesses present during the incident gave consistent evidence regarding the stabbing of the deceased and, clearly the Appellant himself did not deny his presence at the home of PW3 and killing of the deceased. His defence was that he was very drunk. In his present submissions he has emphasised his intoxication while challenging the evidence by **PW4** concerning the motive of the attack.

15. In his judgment the trial magistrate observed that :

> **"Instead of keeping quiet or going away altogether, the Accused person flashed out a sword and immediately stabbed the deceased on the chest thereby killing (him). The action by the deceased in asking the Accused to tone down his voice (sic) was a lawful and reasonable demand by the deceased. The deceased was unarmed and had been in the same house with the Accused person that evening. He posed no risk or danger to the Accused person. The Accused reacted in an extreme manner. No provocation had taken place to warrant such a reaction. It was the most extreme and unlawful response by the Accused person."**

16. Provocation is defined in Section 208 (1) of the Penal Code as follows:

> **"(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.**

17. I agree with the trial magistrate's conclusion that in the circumstances of this case the Appellant's reaction to the deceased was extreme and unwarranted. The Appellant's defence at the trial was not that he was provoked, but rather that he was too intoxicated to know what he was doing. The trial magistrate captured this angle in his judgment and upon considering the provisions to Section 13 of the Penal Code, and the proven conduct of the Appellant properly dismissed the defence.

18. To succeed, a defence of intoxication must be brought within the provisions of Section 13 of the Penal Code. In the present case there is no evidence that the Appellant was rendered insane due to the state of intoxication or through the act of a third party, so as to be incapable of knowing that what he was doing or that it was wrong. The fact that, upon stabbing the deceased the Appellant fled the scene is inconsistent with such a state. That defence was properly dismissed by the trial court.

19. The trial court correctly did not place much weight on the evidence of **PW1** or **PW6** as regards the motive of the attack and in this case it was unnecessary to inquire into the motive. The Appellant's concern in his submissions appeared to be that the court relied on hearsay evidence by **PW6** that the incident occurred due to a love tussle over **PW3** between the Appellant and the deceased. The trial court dismissed the evidence correctly as hearsay.

20. Regarding proof of motive in murder or manslaughter cases the Court of Appeal stated in the case of **Libambula -V- Republic (2003) KLR 683** that:

> **"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya.**

> **<u>Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence.</u> Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime."** *(emphasis added)*

21. Thus whether or not **PW6** may have assumed that the cause of the stabbing was a love tussle between the deceased and the Appellant matters little in this case.

22. In my own view, the single most potent challenge presented in this appeal is the trial court's failure to comply with Section 202 (3) of the Criminal Procedure Code upon taking up the case from the previous trial magistrate. It is true that in this case the trial magistrate was under a duty to inform the Appellant of his right to have witnesses who had testified to be recalled as provided under Section 200 (3) of the Criminal Procedure Code.

23. The Section states:

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

24. The right is to have witnesses "re-summoned" and "reheard", for the obvious object of ensuring a fair trial. The court of Appeal in **Ndegwa -Vs- Republic [1985] KLR 534** stressed the importance of complying with Section 200 (3) of the Criminal Procedure Code by stating that:

> **"No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed; violated or abandoned when it comes to protecting the liberty of the subject…...the statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained. A magistrate who did not observe the evidence is not in position of to assess the credibility and personal demeanour of all authorities."**

25. The court exhorted that, where a trial could be conducted *denovo* and witnesses were available, the court ought to hold a fresh trial rather than continue on the basis of previous proceedings. In this case, only **PW1** had given his evidence-in-chief when **Sitati Ag SRM** took over the trial. Although he did not inform the Appellant of his rights under Section 200 (3) of the Criminal Procedure Code as required, **PW1** was presented on the first hearing before the succeeding magistrate.

26. The record of proceedings prior to 20/1/2014 shows that the witnesses **PW1, PW2** and **PW3** had proved difficult to avail necessitating the issuance of a warrant of arrest against them. On the day the witnesses were brought under a warrant of arrest the proceedings reflect as follows:

> **"Prosecutor – PW1 is present. He was stood down on 17/1/2011"**
>
> **Court – PW1's earlier exam in chief recapitulated."**

27. After **PW1** identified the murder weapon and identified the Appellant, the record shows that the Appellant did not cross-examine **PW1**. Ideally, because only the evidence-in-chief of **PW1** had been given before the preceding trial magistrate, it may have been better to have him testify afresh. However, all the other witnesses gave evidence before the succeeding trial magistrate.

28. Considering the circumstances of this case, I do not think the provisions of Section 200 (3) of the Criminal Procedure Code were violated. The Appellant had the chance to but elected not to question **PW1** even after his evidence in chief was "recapitulated" by the trial court.

29. In the case of **Mutabiri Mithika Koome -Vs- Republic [2016] eKLR** the Court of Appeal stated

regarding compliance with Section 200 (3) of the Criminal Procedure Code:

> **"On numerous occasions, this Court has construed those provisions of the law and we take it from John Bell Kinengeni v Republic [2015] eKLR where the Court stated thus:-**
>
> > **In Richard Charo Mole NRB Criminal Appeal No. 135 of 2004 this Court approved the principles set in Ndegwa versus Republic [1985] KLR 534 and stressed that the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006 the Court added that the use of the words "shall inform the accused person of that right" in section 200 (3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms. In Bob Ayub Alias Edward Gabriel Mbwana Alias Robert Mandiga (supra) the court ruled that the mere mention in the judgment that section 200 (3) was complied with is hollow without any evidence from the record that it was actually complied with in accordance with the law."** (Emphasis supplied)

30. The court, while stressing the duty of the court to comply with Section 200 (3) of the Criminal Procedure Code recognised that, despite the mandatory tenor of the Section, not every failure to comply leads to automatic vitiation of the trial, by the use of the phrase:

> **"that failure……would in an appropriate case render the trial a nullity"**

Section 200 (4) empowers the appellate court to order a retrial where it is of the view that the Accused person has been materially prejudiced in a trial through non-compliance with Section 200 (3) of the Criminal Procedure Code.

31. Considering the circumstances of this case, I am of the view that the Appellant herein was not materially prejudiced as the trial court had opportunity to view the first witness in his second appearance, and testimony before the court, and all the other witnesses who testified before him. Additionally the Appellant had every opportunity to challenge by cross-examination all witnesses including **PW1**. Grounds 1, 2, 4 and 5 in so far as they challenge the conviction have no merit.

32. On the question of the sentence, the record shows that the trial magistrate considered the Appellant's mitigation address. It is not clear however whether the trial magistrate deemed some parts of the mitigation as persistent denial of the offence, hence concluding that the Appellant showed no remorse. Nevertheless, it cannot be said from the facts of the case that the Appellant deliberately consumed alcohol intentionally in order to perpetrate the crime as the trial magistrate observed

33. The appellate court will only interfere with a sentence where the same is manifestly excessive or based on an erroneous or irrelevant consideration. In the case of **Wanjema –Vs- Republic (1971) EA 493**the court stated in this regard:

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

34. Reviewing all relevant matters, it is my view that the sentence imposed in the circumstances of this case was rather excessive, and failed to give due consideration to the fact that the incident occurred during a drinking spree in a chang'aa den. I will therefore interfere by reducing the sentence to a term of 16 years imprisonment, from the date of the sentence. Thus the appeal succeeds only with respect to sentence.

Delivered and signed at Naivasha, this **16th** day of **December, 2016.**

In the presence of:-

For the DPP Mr. Koima

C/C Barasa

Appellant Present

C. MEOLI

JUDGE